No. 87-1819

IN THE

Supreme Court of the United States

October Term, 1987

BARBARA VARANESE,
Petitioner,

vs.

TONY GALL, *et al.*; LAKE-GEAUGA PRINTING COMPANY, d.b.a. GEAUGA TIMES LEADER, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

FORREST A. NORMAN, *Counsel of Record*
GALLAGHER, SHARP, FULTON
& NORMAN
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310
Attorney for Respondent
Lake-Geauga Printing Company

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

COUNTERSTATEMENTS OF THE QUESTIONS PRESENTED

A. DID THE OHIO SUPREME COURT APPLY THE *ANDERSON v. LIBERTY LOBBY* STANDARD IN A MANNER THAT SUPPLANTED OHIO RULE OF CIVIL PROCEDURE 56, SO THAT THE SUMMARY JUDGMENT VEHICLE REPLACES A TRIAL?

B. DOES THE ACTUAL MALICE TEST AS APPLIED BY THE OHIO SUPREME COURT IN THIS MATTER, OPERATE AS AN UNCONSTITUTIONAL DENIAL OF THE RIGHT TO A JURY TRIAL AND OF OPEN ACCESS TO THE COURTS?

II.

STATEMENT OF CORPORATE AFFILIATION

The Lake-Geauga Printing Company, at the time of this incident, was a privately held company with all of its stock owned by the Ashtabula Printing Company of Ashtabula, Ohio. The Ashtabula Printing Company was a privately owned corporation, whose stock was totally owned by the Rowley Family of Ashtabula County, Ohio.

Since the inception of this case, the Lake-Geauga Printing Company assets and the Ashtabula Printing Company assets were sold, and both companies were dissolved, together with the stock and said companies.

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(A) All opinions of the Supreme Court shall be reported in the Ohio Official Reports.

(B) The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

(C) In a per curiam opinion of the Supreme Court, the point or points of law decided in the case are contained within the text of each per curiam opinion and are those necessarily arising from the facts of the specific case before the Court of adjudication.

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STATEMENT OF THE CASE

Respondent must initially apologize for the rather lengthy dissertation of facts which follows. However, in light of numerous misstatements of petitioner—particularly as respects the testimony of witness Curran and his role in the case—a more accurate presentation is required.

In this libel lawsuit, a politician seeks to place a newspaper on trial because it published an advertisement placed by her political opponents. Petitioner is Barbara Varanese, who in 1982 was Geauga County Treasurer, and a candidate for County Commissioner. Her opponent was Township Trustee Tony Gall, whose campaign placed the advertisement at issue just before the November general election.

Mrs. Varanese had been a flamboyant public official, and had thrust herself deeply into a number of controversial public issues. Her record on those issues and her performance as county treasurer were the basic issues in the campaign and the subject of the advertisement.

In the fall of 1982, Susan Waddell was an advertising representative for the Geauga Times Leader, a daily newspaper published by defendant Lake-Geauga Printing Company. Herbert Thompson was the manager of the newspaper, responsible for its overall operations. Robert Curran was the newspaper's editor, with responsibilities and authority limited to the paper's news content. Curran had absolutely nothing to do with advertising (Record at 23, 40, 41; 51, 67-69).

Sometime in mid-October, 1982, Ms. Waddell received the text of the challenged advertisement from the Tony Gall campaign. As she processed the advertisement for publication (making preliminary type size and layout determinations according to instructions from Gall's campaign), Ms. Waddell considered the content of the text. She noticed it confined its comment to Mrs. Varanese's actions as a public official, and contained neither obscenity nor profanity. The ad thus met two of the newspaper's criteria for publication (Record at 1-3).

More importantly, however, Ms. Waddell saw nothing in the text which she believed or suspected to be false. She recalled reading news articles about many of the matters set forth in the text. There were details, of course, that she did not recall. But Ms. Waddell noted the Tony Gall campaign involved individuals with good reputations in the community and she relied upon their reputations when she decided to approve the advertisement for publication (*Ibid.*).

Herb Thompson, her supervisor, looked at the advertisement prior to its publication. He had no occasion to review the advertisement for the purpose of approving or rejecting it. He happened to notice the advertisement as Ms. Waddell was laying it out (Record at 21).

Thompson, a veteran of 28 years of political campaigns, saw nothing wrong with the advertisement and saw it as simply "political talk." In deposition he explained why:

> A. Well, I have been in the newspaper business for 28 years. I have been through political campaigns and races, national, local, whatever all right, and when it gets to political, one is as hotly contested as the other one. I don't care if it is the sanitation engineer or if it is the President of the United States.

(Record at 28).

Petitioner has not asserted that Thompson's statements evidence actual knowledge of falsehood or a high degree of awareness of its probable falsity; rather petitioner concludes that Curran's statements evidence these factors and should be imputed to Thompson (Petition for Writ of Certiorari at p. 12).

Petitioner also asserts that Curran concluded that the advertisement was libelous and that Curran had serious reservations or concerns about the truthfulness of the advertisement (Petition for Writ of Certiorari at p. 6).

Such is not the case. *Even Curran's testimony does not support petitioner's desired conclusion.* Instead, Curran testified at his depositions:

> Q. Did you believe the matters set forth in the advertisement were false?
>
> A. *I did not know if they were false. I did not know if they were true.*

(Record at 74) (Emphasis added).

Contrary to petitioner's assertions, Curran *never* concluded that the advertisement was libelous, *never* testified that he thought the advertisement was false and *nowhere* does he testify that he ever expressed serious reservations or concerns about the truth of the matter. As will be demonstrated in this brief, petitioner misstated, misinterpreted, and took Curran's statements out of context in order to reach the desired conclusion.

Curran's concerns *were not about truth, but of propriety.* The record presented no genuine dispute as to the following facts, as found by the trial judge:

> *In fact, Curran never stated that the statements contained in the advertisement were "libelous." Curran was concerned that the newspaper might be included in a libel action if the advertisement proved to be untrue.* Curran also expressed concern that the footnotes contained in the advertisement cited the Times Leader as an authority for the statements made in the advertisement.

(Emphasis added) (*See* Appendix to Petition for Writ at A39).

The Court of Appeals for Geauga County ignored Curran's own testimony as to what he meant by the use of the term "bullshit," and reversed the entry of summary judgment. In so doing, the appellate court found or created issues of fact where none existed, and ignored the standard of review in public official libel cases which has been set forth in numerous recent Ohio and United States Supreme Court decisions.

The Ohio Supreme Court corrected this misapplication and found that the statements of the respondents, including those of Curran, did not evidence actual malice with convincing clarity in that Curran's statements did not evidence actual knowledge that the advertisement was false nor did it demonstrate a high degree of awareness of its probable falsity.

Petitioner has now petitioned this Court to grant a Writ of Certiorari. As will be demonstrated the Petition presents no viable federal question or true conflict between the Ohio Supreme Court's decision in this matter and Ohio law or the decisions of the United States Supreme Court, but merely expresses the petitioner's dissatisfaction with the outcome of her case in the trial court and Ohio Supreme Court.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE OHIO SUPREME COURT IN THIS MATTER DOES NOT CONFLICT WITH DECISIONS OF OHIO'S COURTS OR THE SUPREME COURT OF THE UNITED STATES BUT MERELY RESTATES WELL ESTABLISHED "BLACK LETTER" LAW AS RESPECTS A PUBLIC OFFICIAL'S BURDEN IN A DEFAMATION ACTION.

This case very simply involves the application of a principle of law which has been well defined and specifically stated by both the Ohio Supreme Court and the United States Supreme Court. The respondent respectfully submits that nothing will be gained in terms of guidance to the federal courts or Ohio's courts as a result of the court reviewing this case involving yet another defamation action regarding a public official.

The degree of the burden placed upon a public official attempting to withstand a defendant's motion for summary judgment in a libel action has been specifically stated and is well established in Ohio law as follows:

> In order to withstand defendant's motion for summary judgment in a libel action brought by a public official, the plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity.

(*Bukky v. Lake-Geauga Printing Co.* (1981), 68 Ohio St. 2d 45, *reaffirmed, see Grau v. Kleinschmidt* (1987), 31 Ohio St. 3d 84, 90).

The Ohio Supreme Court's holdings are consistent with the rulings of the United States Supreme Court, in that to defeat a defendant's motion for summary judgment in a defamation action a public official cannot

merely present facts which raise *some* issue of fact; rather a public official must present substantial facts of sufficient persuasive value that would:

> . . . allow a rational finder of fact to find *actual malice* by *clear and convincing evidence.*

Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. _____, 91 L. Ed. 2d 202, 215.

A. Actual Malice

Since *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, it has been hornbook law that the federal constitution bars recovery for defamation regarding a public official or a public issue unless the defamatory material was published with "actual malice" *i.e.,* with knowledge of falsity or with reckless disregard as to the truth of the matter.

The Ohio Supreme Court in this matter relied upon this black letter law and applied other United States Supreme Court decisions which further explained the standard or proof plaintiff must demonstrate as it stated:

> Such reckless disregard may be established by clear and convincing evidence that the defendant proceeded to publication despite a "*high degree of awareness of *** probable falsity*," *Garrison v. Louisiana* (1964), 379 U.S. 64, 74 or that "*the defendant in fact entertained serious doubts as to the truth of his publication.*" *St. Amant v. Thompson* (1968), 390 U.S. 727, 731. The United States Supreme Court has emphasized that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious* doubts

> as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant, supra* at 731 (Emphasis added).

(*See* Appendix to Petition for Writ at A5).

The standard to be applied in this action is clear. Petitioner in order to overcome defendant's motion for summary judgment is required to show actual malice on the part of the respondent in that petitioner must demonstrate with *convincing clarity* that the respondent published the statement with (1) *actual knowledge* that the statement was false, or (2) a *high* degree of awareness of its *probable* falsity.

Therefore the burden of the petitioner in this matter in order to overcome defendant's motion for summary judgment was succinctly and accurately stated by the Ohio Supreme Court in a manner that is consistent with both the previous decisions in Ohio's courts as well as the United States Supreme Court.

B. Application of the Defamation Standard

The standard for defamation cases involving public officials was correctly set forth by the Ohio Supreme Court in this matter and was properly applied based upon the facts of this case.

Petitioner in essence bases her entire case upon the statements of Robert Curran, an editor at the Geauga Times Leader. Petitioner does so even though the undisputed evidence indicates that Curran had no involvement whatever in the advertising approval process (Record at 23, 40-41, 51, 67-69). As *New York Times Co. v. Sullivan* made plain more than twenty years ago the proper focus regarding the knowledge of falsity

is upon the individuals actually "having responsibility for the publication of the advertisement." *New York Times, Co.*, 376 U.S. at 287.

The proper focus in this case is, thus, on whether Susan Waddell, the advertising representative responsible for the approval of the publication of the advertisement, knew or seriously suspected the advertisement, or the contents thereof, to be false at the time of publication. The record is undisputed that she had no such knowledge or suspicion. Further evidencing this fact, her affidavit to that effect (Record at 1-3) was unchallenged and petitioner did not even file her deposition for purposes of challenging any statements made in the affidavit. Petitioner also does not contend that Ms. Waddell had knowledge or suspicion of any falsity in the advertisement.

Therefore, the issue of knowledge or suspicion of falsity on the part of the *individual* responsible for the publication of the advertisement, Susan Waddell, has not been presently raised by the petitioner and is not at issue.

Petitioner attempts to misinterpret and take out of context Curran's statements in order to meet the burden of proof placed upon her in a public official defamation action. Contrary to the assertions made by the petitioner; Curran's testimony demonstrates that he neither *knew nor suspected* the advertisement to be false; he never told Herbert Thompson that the matters set forth in the advertisement were false; he did not talk with Waddell about the advertisement; and in no manner ever declared the advertisement to be libelous. Curran's testimony simply does not support the petitioner's desired conclusion. Rather, Curran testified at his deposition:

Q. Did you believe the matters set forth in this advertisement were false?

A. I did not know if they were false. I did not know if they were true.

(Record at 74).

Curran did not even express any doubts as to truth of the matter. He simply did not know. Curran was concerned about the *propriety* of the use of the newspaper's name in the footnotes of the advertisement. He testified at deposition:

A. I said it [the advertisement] was bullshit.

Q. And why did you say that?

A. I said it because it appeared to be, and was, a listing of specific apparent charges from one candidate to another, *and using as reference points,* these numbers which appeared, which *reference to footnotes,* and which included in them were the Geauga Times Leader. The Geauga Times Leader was our newspaper, and I said, "it is bullshit. We can't use this."

Q. Why could you not use that, in your judgment?

A. In my judgment, to have specific charges of possible wrongdoing referring to our newspaper by name as the source of this information would be a problem to us *if* these charges were not accurate. *It would be a problem to us, anyway, because it would appear that we were supporting one candidate in an advertisement prepared by another.* It would appear we were giving it our imprimatur, for one. But, secondly, that we were justifying these charges and the—how can I word it?

Q. All right. Go ahead sir.

A. When you see something that says, $11,000,000 of unopened tax receipts lay in her vault "idle," she is the treasurer of the county. Her

job is to deal with money, that is her elected position. To say that we said that she misused the money, what *if* she didn't?

I said—the term was, "It is bullshit." Followed by, "*If* these aren't right, at all, in any way, and we can get sued, *if* there is a libel, we can be included because our name is included."

Q. In the footnotes?

A. In the footnotes.

(Record at 53-54) (Emphasis added).

Curran's statements, contrary to the petitioner's assertions contained in her Petition's statement of facts *do not* conclude that the advertisement was in his opinion "libelous" and *do not* voice "serious reservations about the truthfulness" of the advertisement (*See* Petition for Writ of Certiorari, p. 6).

Petitioner next attempts to build upon her weak foundation as she incorrectly concludes that Curran's statements evidence a high degree of awareness of probable falsity *and then attempts to impute this false assumption to the general manager,* Herbert Thompson. Petitioner's assertion, as demonstrated earlier, is unfounded as there is no evidence that Curran knew the advertisement was false or had serious suspicions as to the truth of the matter. Also, there is no evidence which indicates that Thompson knew the advertisement was false or had a high degree of awareness of its probable falsity. Petitioner's assertions regarding Thompson are simply groundless.

Petitioner, in passing (Petitioner's statement of facts, Petition for Writ of Certiorari at p. 6), asserts that the respondent made no efforts to verify or corroborate

the statements and a simple check of prior news articles, documents in its possession or questions of its reporters would have disclosed the falsity of the statements.

The Ohio Supreme Court relying upon the prior rulings of the United States Supreme Court strongly rejected this contention as a "mere failure to investigate the accuracy of a news story cannot, by itself, establish liability." *St. Amant* at 733. (*See* Appendix to Petition for Writ at A12).

Therefore petitioner's assertions regarding the duty of the respondent in this action to investigate or research the accuracy of an advertisement are groundless.

The evidence and record of this action demonstrate that the Ohio Supreme Court properly stated and applied the correct standard regarding the burden of a public official when trying to overcome a defendant's motion for summary judgment in a defamation action.

II. PETITIONER HAS FAILED TO RAISE OR PRESERVE THE CONSTITUTIONAL ISSUE REGARDING THE RIGHT TO A JURY TRIAL AND OPEN ACCESS TO THE COURTS FOR WHICH IT NOW SEEKS REVIEW.

Petitioner in her Petition for Writ of Certiorari admits that these constitutional issues were not previously addressed. Petitioner has failed to raise, present, or preserve the specific right to a jury trial and open access to the court's issues which it now seeks to introduce.

Ohio's courts have held, "It has long been the rule of this Court that the syllabus contain the law of the case." *State ex rel. Donohey v. Edmondson* (1913), 89 Ohio St. 93, 107-108. *See Beck v. Ohio* (1964), 379 U.S. 89, 93.

This principle of law is also set forth in Rule 1(B) of the Ohio Supreme Court Rules for the reporting of opinions and states:

> The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the court for adjudication.

Therefore, the only matters decided by the Court are found in its syllabus.

The United States Supreme Court has consistently held that where, as is evident here, "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts." *Street v. New York* (1969), 394 U.S. 576, 582. The policy considerations including the need to insure a sound and accurate record, and the requisite that the state's highest court first actually decide the constitutional issue are well established and require that the petitioner demonstrate that the issue was presented to and decided by the Court which is now subject to review. *Hill v. California* (1971), 401 U.S. 797.

Petitioner by her own admission has failed to raise, present or preserve the very issue for which she now seeks review. Respondent states, therefore, that a review of this issue should be denied.

Respondent further states that petitioner's assertions are without merit in that the reasons set forth regarding the failure to previously raise this issue are groundless. The general posture and basic issues of this action have not changed during the adjudication by Ohio's courts.

As established earlier in this brief the actual malice test was correctly stated and applied by the Ohio Supreme Court pursuant to the long established holdings of the United States Supreme Court. Petitioner's vague assertions that the Ohio Supreme Court somehow applied a more stringent standard of the actual malice test are without merit and are utterly groundless.

The petitioner next asserts that the Ohio Supreme Court inappropriately weighed the evidence pursuant to an independent review of the same. Ohio's courts and the United States Supreme Court have agreed that in cases of this type an independent review is necessary and encouraged. The court has an obligation to undertake an independent "examination of the whole record, in order to make sure that the judgment [below] does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union* (1984), 466 U.S. 485, 499, *see Grau v. Kleinschmidt* (1987), 31 Ohio St. 3d 84, 92-94. It is also well established that: "[c]lose judicial scrutiny [is required] to ensure that cases about types of speech and writing essential to a vigorous First Amendment do not reach the jury." *Ollman v. Evans* (D.C. Cir. 1984), 750 F.2d 970, 997.

It is submitted that petitioner's contentions are groundless. The Ohio Supreme Court has properly stated and applied the correct standard for a case of this type and has properly fulfilled its obligation to independently examine the whole record.

CONCLUSION

For the foregoing reasons, respondent urges the United States Supreme Court to deny the instant Petition.

Respectfully submitted,

FORREST A. NORMAN, *Counsel of Record*
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310

Attorney for Respondent
Lake-Geauga Printing Company

Of Counsel
GALLAGHER, SHARP, FULTON
& NORMAN